Supreme Court, U.S.
FILED
DEC 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-624 (2)

In The
Supreme Court of the United States
October Term, 1988

ROY HICKS,

Petitioner,

v.

ROBERT C. FEENEY, individually and in his official capacity as Director of the Delaware State Hospital,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Date: December 7, 1988

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20 pp

QUESTION PRESENTED

Did the court of appeals and the district court abuse their discretion when they refused to allow petitioner to continue his civil rights action for nominal damages after he willfully failed to appear for his deposition on three separate occasions?

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COUNTER-STATEMENT OF THE CASE

On November 18, 1982, a judge in the Family Court of the State of Delaware found petitioner, Roy Hicks, guilty of criminal contempt. The court sentenced Hicks to 30 days in jail, but suspended the imprisonment in favor of one year's probation. As part of its probationary order, the court sent Hicks to the Delaware State Hospital ("DSH") for a mental evaluation and ordered him to follow DSH's recommendations, including "continuing hospitalization,"

"as may be permitted by law." *Hicks II*, Pet. App. at A-48 to A-49.[1]

On November 23, DSH reported to the Family Court judge that Hicks suffered from a "psychiatric condition" requiring further evaluation. In a letter sent the next day, the hospital told the judge that Hicks exhibited symptoms of a "major mental illness" and recommended his commitment. Following the routine in cases of a patient's referral by a court, the hospital waited for further directions from the Family Court. When the judge finally responded, agreeing to the commitment, respondent Feeney, then the Director of DSH,[2] prepared a complaint seeking to have Hicks committed under Delaware's Involuntary Commitment Act, Del. Code Ann. tit. 16, §§ 5001-14 (1983).[3] *Hicks II*, Pet. App. at A-49, A-52; Feeney Deposition at 29-31 (April 10, 1984). The complaint was filed in the Delaware Superior Court on December 27, 1982. The initial "probable cause" hearing was scheduled for January 14, 1983, but Hicks was released from the hospital on January 12, 1983.

Four months later, Hicks initiated in the federal district court a civil rights action under 42 U.S.C. § 1983. In his complaint, he alleged that Feeney had confined him in DSH without due process. Hicks requested declaratory

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[1]In this brief in opposition, the respondent will designate the various opinions in this case using the same terminology employed by the petitioner.

[2]Robert Feeney left DSH and employment with the State of Delaware in April, 1985.

[3]The procedures under the state law are summarized in *Hicks I*, Pet. App. at A-62 to A-64. The Delaware Superior Court supervises the commitment process.

and injunctive relief against Feeney in his official capacity and compensatory damages from him in his individual capacity.

On cross motions for summary judgment, the district court entered judgment in favor of Feeney. While agreeing that Hicks' hospitalization implicated a protected liberty interest, the district court found that Delaware, by its commitment act, provided constitutionally sufficient safeguards. Thus, in Hicks' case, any omission of the procedural protections resulted, not from an inadequacy in the state system, but an unauthorized failure to follow the state procedures. Looking to *Parratt v. Taylor*, 451 U.S. 527 (1981), it found, that in light of a variety of post-deprivation remedies, Hicks was afforded sufficient due process to redress the unauthorized failure of DSH to implement, upon Hicks' arrival, the state commitment act procedures. *Hicks I*, Pet. App. A-74 to A-84. Secondly, the court concluded that even if the federal constitution required a pre-deprivation hearing in this judicial commitment case, Feeney was entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Hicks I*, Pet. App. at A-94 to A-95.

On appeal, the Court of Appeals for the Third Circuit vacated the district court's judgment. Initially, it concluded that because DSH had apparently followed its normal procedure in delaying the use of the state commitment act until it received further instructions from the referring court, the district court had erred in finding the hospital's actions unauthorized so as to justify application of *Parratt*. *Hicks II*, Pet. App. at A-52 to A-53. In addition, the court of appeals ruled that the district court, in

its qualified immunity analysis, had not only misread Hicks' claim, but had extended the scope of official immunity by requiring too strict a congruence between established precedent and the facts of the litigated case. It remanded the immunity question for reconsideration in light of this Court's then-recent decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). *Id.*, Pet. App. at A-53 to A-57. Finally, the court suggested that the district court should also explore, as part of the immunity issue, whether Hicks' claim implicated a separate state-law grounded liberty interest created by the state commitment act and whether state procedures had been violated. *Id.*, Pet. App. at A-56 n. 4.

On remand, Hicks moved for summary judgment on the qualified immunity and state-law liberty interest issues. At the same time, the district court ordered discovery to be completed by February, 1986. Hicks made no application to limit the scope of discovery. Feeney noticed Hicks' deposition for January 28, 1986. Hicks appeared and answered questions for about forty minutes. At that point, he became agitated about answering questions on notes he had prepared on his stay at DSH. The deposition was recessed for an hour to allow Hicks to review the materials. Hicks, without any warning to his attorney, never returned. Feeney re-noticed Hicks' deposition for February 14, 1986. When his lawyer went to pick him up at his home, Hicks was gone.

Feeney then moved, pursuant to Fed. R. Civ. P. 37 (a), for an order requiring Hicks to attend his deposition. While this motion was pending, Feeney, in an effort to move the matter along, re-noticed Hicks' deposition for

April 8, 1986. Although he told his lawyer he would attend, Hicks, again, did not appear. On July 9, 1986, counsel for Hicks sent a letter to the district court explaining that his client chose not to appear at the depositions "because he did not want to discuss what he believed to be extremely private matters concerning what happened to him while he was confined." Although he was aware of the possible consequences, Hicks said he would not appear at any future depositions "because he valued his privacy concerning these matters more than any compensatory damages that the court might award." However, Hicks did not request any protective order under Fed. R. Civ. P. 26(c) nor assert any defense to the request for an order under Rule 37(a). *Hicks III*, Pet. App. at A-23 to A-24.

On July 16, 1986, the district court ordered Hicks to appear and co-operate in the taking of his deposition or risk the court's imposition of sanctions, including "an outright dismissal." Although he spoke with his lawyer two times about the order and he indicated he would comply, Hicks failed to appear for his court-ordered deposition on July 29, 1986. Feeney then moved to dismiss the action under Fed. R. Civ. P. 37(b)(2)(C) and 37(d). *Hicks III*, Pet. App. at A-24.

Hicks opposed the request arguing that dismissal would exceed the scope of the court's powers under Rule 37. Asserting for the first time in the discovery proceedings that the prior court of appeals decision had established that Hicks had been confined without due process, he argued that the only issues properly before the court on remand were Feeney's qualified immunity and dam-

ages. Because the former issue was a legal question, decided from an objective viewpoint, and because Hicks was presently willing, if necessary, to permit an order precluding any claim for damages beyond nominal and punitive damages (and attendant attorney's fees), Hicks contended that any testimony from him was now irrelevant to the remaining, now re-formulated, issues. Hence, total dismissal was an inappropriate sanction.

While recognizing that dismissal "must be a sanction of last, not first, resort," the district court dismissed the action under Rule 37(d). It found that Hicks bore personal responsibility for "willful" discovery violations because he made the "conscious decision," after being warned of the consequences, not to appear at the depositions and there was "no allegation that Plaintiff's mental state makes it difficult or impossible for him to appear at the deposition." *Hicks III*, Pet. App. at A-30, A-33 to A-34. Moreover, the violations were prejudicial because without the opportunity to depose Hicks, Feeney would be unable to ascertain or test the facts underlying his claims or to judge Hicks' credibility. *Id.*, Pet. App. at A-31 to A-32. Turning to Hicks' arguments concerning the scope of the remaining issues, the district court responded that "it d[id] not believe that the Third Circuit ha[d] ruled as a matter of law that Plaintiff was deprived of liberty without due process." *Id.*, Pet. App. at A-36. Moreover, even if liability had been established by the earlier decision, the district court still had "grave doubts" about allowing the case to proceed, despite the discovery violations, solely as an action for nominal damages and attorney's fees when Hicks "ha[d] lost whatever motivation he may have had to diligently pursue this lawsuit." *Id.*, Pet. App. at A-42.

Finally, the district court concluded that dismissal was appropriate because Hicks had flagrantly disregarded his obligations under the discovery procedures. Under the rules, if Hicks objected to the taking of his deposition or to a particular line of questioning, it was incumbent upon him to seek a protective order. Because he did not do so, but only raised his arguments concerning the limited issues in response to the request for sanctions, the court concluded that it could not tolerate such an abuse of the process. *Id.*, Pet. App. at A-45.

In 1988, a divided panel of the court of appeals affirmed the dismissal. Initially, the majority rejected Hicks' argument that its earlier opinion established Feeney's liability, concluding that in "[r]eviewing *Hicks II*, we do not find such a holding." *Hicks IV*, Pet. App. at A-6. Without resolution of the qualified immunity question, there could not have been a determination of liability entitling Hicks to a judgment. *Hicks IV*, Pet. App. at A-6 n.4. Moreover, because the earlier opinion made "no findings as to whether a hearing took place and if not, why not," Hicks' deposition testimony remained relevant to possibly shed light on "why he did not have a hearing and why he was placed in a maximum security building." *Id.*, Pet. App. at A-6.

In addition, the court concluded that in the absence of any prior holding of liability, the district court did not abuse its discretion in dismissing the claim. Cognizant that discovery sanctions are necessary not only to punish a party who fails to comply with the process, but to deter future violations, *Hicks IV*, Pet. App. at A-8, the court found that given Hicks' personal responsibility for not

attending the depositions, dismissal was an appropriate sanction. To allow Hicks to simply proceed with the case for nominal damages would ignore Hicks' prior willful conduct and would relegate the sanction process to "weigh-[ing] the relative prejudices to the parties," devoid of any deterrent content. *Id.*, Pet. App. at A-9. Finally, the court noted that even if the result was to deprive Hicks of the possibility of a judgment for nominal damages and attendant attorney's fees, the public interest in vindicating deprivations of civil rights would not preclude dismissal where "Hicks lost all interest in preserving his rights before he obtained any relief." *Id.*, Pet. App. at A-10.

In dissent, Judge Rosenn agreed with Hicks that the court's earlier opinion had indeed determined that Hicks' confinement had violated due process, leaving only the issues of immunity and damages. *Hicks IV*, Pet. App. at A-11 to A-14 (Rosenn, J., dissenting). In light of that conclusion, he found that although Hicks bore personal responsibility for willful and repeated violations, any prejudice to Feeney could be cured by limiting Hicks to an award of nominal damages. Because of the availability of this lesser sanction, dismissal had been an inappropriate remedy. *Id.*, Pet. App. at A-15 to A-19. Hicks' petition for rehearing *en banc* was denied by the court of appeals on July 19, 1988. Pet. App. at A-100.

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REASONS FOR DENYING THE PETITION

This petition does not present any question which has divided the lower courts or which involves an important national issue. Instead, Hicks asks this Court to hold that, in this particular case, both the district court and the court of appeals abused their discretion when they barred him from continuing his civil rights action solely for nominal damages after he deliberately chose not to appear, three times, for scheduled depositions. In Hicks' two-tiered analysis, the court of appeals misread, initially, its own earlier opinion in *Hicks II*. In his view, the earlier case had established, as the "law of the case," that a due process violation had occurred. Because of this error, the subsequent dismissal of his entire action based on his discovery misconduct was disproportionate punishment in violation of the Due Process Clause. Any prejudice to Feeney could be sufficiently cured by limiting his recovery to nominal damages. He now asks this Court to invoke its supervisory power to vacate the dismissal. No such relief is warranted.

1. IT WOULD BE INAPPROPRIATE FOR THIS COURT TO REVIEW THE COURT OF APPEALS' CONSIDERED CONCLUSION CONCERNING THE "LAW OF THE CASE."

The linchpin of Hicks' argument is that this court must reverse the court of appeals' determination that its earlier opinion in *Hicks II* did not hold that Hicks had been confined without due process. However, common sense suggests that if any court would understand what "law" was established in *Hicks II*, it would be the court which authored the opinion. The parties extensively

argued the "law of the case" issue before the court of appeals and the court carefully considered it.[4] It would be an inappropriate exercise of this Court's "supervisory" power to grant this petition to overrule the court of appeals' considered conclusion concerning the scope of its earlier ruling in one particular case.

Secondly, to grant the petition in this case would require this Court to do more than simply determine whether the majority or the dissent in the court of appeals accurately read the prior opinion. Even if this Court would think that the dissent had the better reading of *Hicks II*, this Court could exercise its supervisory power only after independently concluding that a due process violation occurred. When this Court grants certiorari to a petition involving the "law of the case," the entire case is exposed to review. *Christianson v. Colt Industries Operating Corp.*, 108 S.Ct. 2166, 2178 (1988). In this case, the record is simply not well enough developed for this Court to comfortably endorse the view that the hospitalization of Hicks was not preceded by adequate procedural safeguards.

2. EVEN IF THE COURT OF APPEALS MISREAD ITS PRIOR OPINION, DISMISSAL WAS THE APPROPRIATE SANCTION IN THIS CASE.

Indeed, regardless of whether the court of appeals misread its earlier opinion in *Hicks II*, the district court did not abuse its discretionary authority when it dis-

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[4]The court of appeals panel in *Hicks IV* originally issued an opinion in March, 1988. Upon Hicks' petition for re-argument, it withdrew that opinion and requested additional briefing before rendering its final opinion in *Hicks IV*. *See* Pet. App. at A-102; *Hicks IV*, Pet. App. at A-6 n. 4.

missed Hicks' action for his repeated, willful violations of the discovery rules. Because rules providing for pre-trial discovery are an important part of the process for promptly and accurately resolving disputes, this Court has recognized that the imposition of sanctions under Fed. R. Civ. P. 37, including dismissal, is justified not only to "punish" the party for failing to provide pre-trial information but to deter him, and other litigants generally, from disobeying the discovery rules. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976). Moreover, as this Court has recently emphasized in the similar context of pre-trial discovery in criminal trials, none of the constitutional guarantees, including the Due Process Clause, require the courts to link their discovery sanctions exclusively to the prejudice suffered by the adverse party. *Taylor v. Illinois*, 108 S.Ct. 646, 656 (1988); *id.*, 108 S.Ct. at 664 (Brennan, J., dissenting) ("Of course, discovery sanctions must include more than corrective measures. They must also include punitive measures that can deter future discovery violations from taking place."). In imposing sanctions, "[m]ore is at stake than possible prejudice to the [opposing party]." *Taylor*, 108 S.Ct. at 656. The choice of sanctions must also be concerned "with the impact of this kind of conduct on the integrity of the judicial process itself." *Id.* While constitutional guarantees may grant a party a right to plead and attempt to prove his claims, that right does not "automatically and invariably outweigh countervailing public interests" including "the interest in the fair and efficient administration of justice." *Id.*, 108 S.Ct. at 655. Particularly where the party is personally responsible for the discovery violations, his willful misconduct during the pre-trial process

justifies the "severest sanction", regardless of whether the prejudice to the other party can be alleviated by lesser sanctions. *Taylor,* 108 S.Ct. at 656; *id.,* 108 S.Ct. at 664, 666 (Brennan, J., dissenting).

Here, Hicks' conduct during the discovery process, regardless of his ability to mitigate the resulting prejudice by foregoing actual damages, was sufficient to justify dismissal. Three times Hicks, after giving indications that he would attend his deposition, failed to appear. He flaunted the authority of the district court by failing to appear after the court ordered him to do so under Fed. R. Civ. P. 37(a). The resulting harm was more than Feeney's inability to discover Hicks' testimony. His repeated conduct of indicating that he would attend, and then not appearing, prolonged this single aspect of the discovery process from January to July, 1986. The district court was forced to take time from its schedule to order him to appear and then conduct a hearing to determine the appropriate sanction for his disobedience. Counsel on both sides also suffered. For six months they wasted their time in a series of unsuccessful attempts to hold the deposition. To accept Hicks' belated plea that dismissal is disproportionate, because he is now willing to forego actual damages, would make the discovery process a mockery and relegate the discovery rules to mere admonitions.

Indeed, to grant this petition and reinstate Hicks' action would require this Court to overturn part of Fed. R. Civ. P. 37(d). Under that rule, a party may not defend against sanctions under Rule 37(d) on the ground that the discovery sought was objectionable unless the party previously applied for a protective order under Fed. R. Civ. P. 26(c). 8 C. Wright & A. Miller, *Federal Practice*

and Procedure § 2291, at 810-11 (1970).[5] Thus, if a party believes that he need not attend his deposition, "he must apply for a protective order." Fed. R. Civ. P. 37, advisory committee's note, subdivision (d) (1970 amendment). By requiring the party to so seek such an order, the rule insures that he will have "a fair and effective procedure whereby he can challenge the request made" while avoiding "the severe inconvenience or hardship on the discovering party" and the "substantial[] delay [in] the discovery process" which would occur if he simply failed to appear and withheld his objection until the sanction stage. *Id. Cf. Taylor,* 108 S.Ct. at 656 n.20 (in cases where party has legitimate objection to discovery, "[s]uch objections, however, should be raised in advance of trial in response to the discovery request and, if the parties unable to agree on a resolution, presented to the court" which can then enter a protective order).

Here, Hicks transgressed this rule. If Hicks had an objection to his deposition because it was beyond the scope of the remand order, it was incumbent on him to seek a protective order to resolve the issue rather than simply ignore the deposition notices. Similarly, if as expressed in his July 9 letter, his privacy was more important to him than his claim for compensatory damages, he should have then sought a protective order limiting discovery on the basis of his rejection of all damages beyond a nominal

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[5]Similarly, if a party has objections to an order compelling discovery entered by the court under subdivision (a) of Rule 37, the time to voice the defenses is at the hearing on the order. He cannot sit idle while the order is entered and then make known his objections when sanctions are sought under subdivision (b). 8 Wright & Miller, § 2289, at 790-91.

amount. In this case, he did neither, but chose to raise his objections in response to the imposition of sanctions. Unless Rule 37(d) is to be a nullity, Hicks' petition should be denied.

Finally, Hicks' potential ability to recover his attorney fees, if his action continued and he prevailed, does not make the dismissal disproportionate. As this Court has recently recognized, the right to recover attorney's fees under 42 U.S.C. § 1988 does not mandate the continuation of a lawsuit where the party-litigant no longer has a personal stake or interest in the redress of his constitutional injury. *Rhodes v. Stewart,* 109 S.Ct. 202, 203 (1988). Because the award of fees is predicated, not on a party obtaining favorable rulings on points of law, but the entry of judgment, *Hewitt v. Helm,* 107 S.Ct. 2672, 2676 (1987), section 1988 does not impose its own rules for when actions may cease to be viable or may be subject to dismissal. Thus, if, as here, Hicks is not entitled to pursue his claims because of his willful discovery violations, section 1988 does not mandate that the district court overlook his defaults. *Stewart,* 108 S.Ct. at 203.

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CONCLUSION

For the above reasons, Hicks' petition should be denied.

Respectfully submitted,

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